We appreciate this important difference that in the Indian case the sanctioning authority was the Government whilst in this instant case the certifying authority is the Director of Public Prosecutions who must be presumed to have gone into the facts of the case before he issued the certificate. Notwithstanding that we are of the opinion that the certificate for the purpose of regulation 4 must state the offence and such particulars as to the time and place of the alleged offence as are reasonably sufficient to give notice of the matter in question.

We notice in the case of *Sambasivam* v. *Public Prosecutor, Federation of Malaya*[3] the certificate under regulation 7 of the Emergency (Criminal Trials) Regulations of 1948 signed by the deputy public prosecutor ran thus: —

"The Emergency (Criminal Trials) Regulations, 1948.

I, William Martin McCall, Deputy Public Prosecutor, in accordance with the provisions of section 7 of the Emergency (Criminal Trials) Regulations, 1948, hereby certify that the trial of Sivam alias Sambasivam s/o Narayanasamy on the following charges, namely: —

1. That he at about 10 a.m. on September 13, 1948, at Bukit Kepong, Muar, in the State of Johore, carried a .38 revolver which he was not duly licensed to carry, and he has thereby committed an offence punishable under regulation 4(1)(a) of the Emergency Regulations, 1948: and

2. That he at about 10 a.m. on September 13, 1948, at Bukit Kepong, Muar, in the State of Johore, had in his possession ten rounds of .38 ammunition without lawful authority therefor and he has thereby committed an offence punishable under regulation 4(1)(b) of the Emergency Regulations, 1948, is a proper case for trial under the said Regulations and I hereby designate Johore Bahru as the place where such trial shall be held.

Dated at Johore this 25th day of November, 1948.

(Sgd.) W. Martin McCall,
Deputy Public Prosecutor
for Solicitor-General."

We think that this practice should be followed except that the words "for Solicitor-General" should be omitted.

We therefore say that for reasons stated above the certificate in the instant case in merely stating the names of the accused on the face of it was inadequate and the trial was therefore a nullity.

Appeal allowed.

WEE KING HOCK & ORS. v. PUBLIC PROSECUTOR

[F.C. (Azmi L.P., Ismail Khan C.J. (Borneo) and Pawan Ahmad J.) April 23, 1971]

[Kuching — Federal Court Criminal Appeal No. 26 of 1970].

Criminal Law and Procedure — Appeal — Lodgment of notice — Subsequent withdrawal of notice — Application to file fresh notice of appeal out of time — Special circumstances must exist before the court of appeal allows withdrawal of notice of abandonment — Federal Court (Criminal Appeals) (Transitional) Rules, 1964, r. 20.

Criminal Law and Procedure — Caution statements — Whether made voluntarily — Lumping together statements made by accused persons — Failure to consider them individually — Effect of.

Penal Code, ss. 34 & 420 — Cheating charge — "Did obtain this sum by dishonestly representing" — Whether sufficient to include allegation of inducement — Criminal Procedure Code (Sarawak Cap. 58) s. 142.

This was an appeal against the conviction of the appellants on a charge of cheating. The main ground of appeal related to the way in which the trial judge dealt with the caution statements. It was argued that they were not made voluntarily and that the learned judge had just lumped together the statements made by the accused.

One of the accused had originally filed a notice of appeal but subsequently he filed a notice of withdrawal of the appeal. He later applied to the Federal Court for leave to file a fresh notice of appeal out of time.

Held, dismissing the appeal: (1) the learned trial judge had fully and correctly gone into the question of law before admitting the caution statements. Although he did not specifically refer to the various parts of the statements and say in each case what part he would admit and against whom, he had in his judgment made it clear that in dealing with these caution statements he would not make use of any part of the statements which implicated another co-accused;

(2) there must be special circumstances before the appellate court could allow the withdrawal of a notice of abandonment of appeal and in this case there were no such special circumstances.

Case referred to:-

(1) *R.* v. *Healey* (1956) 40 Cr. App. R. 40.

FEDERAL COURT.

C. T. Wong for the appellants Nos. 1 & 4.

Joseph Tang for the appellants 2 and 3.

Denis Ong for the Public Prosecutor.

Azmi L.P.: We dismissed the appeals of the 2nd, 3rd and 4th appellants and indicated we would give our reasons later. Here now are our reasons.

The above four accused were convicted by the High Court at Sibu on the following charge:—

"That all of you between the 30th day of December 1969 and the 7th day of January 1970 at diverse places in Sibu including Kim Geok Coffee Shop 46 Sungei Antu, and the Esso Installation at Igan Road, acting together and in furtherance of the common intention of you all did cheat and thereby obtained $13,000 cash from Wong Chiong Hiong alias Wong Siong Hiong in that you did obtain this sum by dishonestly representing to the said Wong Chiong Hiong that in return for the said sum you would obtain for him valuable gold bars and you thereby committed an offence punishable under section 420 of the Penal Code read in connection with section 34 of the Penal Code."

and were sentenced to various terms of imprisonment namely the first accused to 33 months' imprisonment, the second accused to 24 months' imprisonment, the third accused to 25 months' imprisonment, the fourth accused to 25 months' imprisonment and in addition were also fined $500 each or 7 months' imprisonment in default. The appeal was against both conviction and sentence.

In reference to the first accused, however, he withdrew his appeal but applied to us at the last hearing for leave to file a fresh notice of appeal out of time. In his affidavit in support of his application he states as follows: —

"(5) On 14th September 1970 I lodged the notice of appeal with the Registrar of this Honourable Court.

(6) On the 30th day of September, 1970, I gave notice of withdrawal of appeal to the Registrar of this Honourable Court and a warrant of committment was issued by the Sibu High Court on the same day and I was sent to serve my sentence aforesaid in the Sibu Prison.

(7) I now have made up my mind to appeal against the decision of the Honourable Mr. Justice George K.S. Seah given in the High Court in Borneo at Sibu on the 12th day of September, 1970."

We dismissed his application and gave our reasons for dismissing it but in our view we should restate the reasons we gave in this judgment.

It would be apparent that the first accused's application was not just an application for leave to file a notice out of time but it was also an application to withdraw his abandonment of appeal. In our view, rule 20 of the Federal Court (Criminal Appeals) (Transitional) Rules 1964, would appear relevant. Rule 20 reads as follows:—

"20(1) Where an appellant, at any time before the commencement of the hearing, wishes to withdraw or discontinue his appeal he may do so without the leave of the court by filing in duplicate with the Registrar of the High Court at the place where the notice of appeal was filed a notice in the Form G in the First Schedule thereto.

(2) Upon the filing as aforesaid of such notice the appeal shall be deemed to have been dismissed by the court."

We find that this rule is substantially similar to the English rule 23 of the Criminal Appeals Rules 1960. The Court of Criminal Appeal of England had occasion to consider this rule in *Reg.* v. *Healey*.[1] At page 43 we find the following passage in the judgment of the court.

"There is no doubt that the court has power to allow the withdrawal of a notice of abandonment. It has very seldom allowed it. It is allowed only if there are special circumstances or as Avory J. put it in *Van Dyn* (1932) 23 Cr. App. R. 150 at p. 152, some misapprehension or mistake of fact. Exactly what the learned judge meant by 'misapprehension' as distinct from a mistake of fact is perhaps difficult to understand. He was thinking probably of some misapprehension as to what had happened with regard to the appeal or with regard to the notice of appeal. I am quite certain that misapprehension or mistake of fact does not arise if the prisoner has been weighing up his chances and decides it would be more advantageous to him to abandon his appeal, and he is then advised that that was an unfortunate decision to make."

It is clear from that judgment that there must be special circumstances before the court of appeal would allow the withdrawal of the notice of abandonment and that the court would allow such withdrawal if it would be made clear to it that there has been some mistake of fact. It is also clear from the judgment that it would not be a case of a mistake of fact if the prisoner had after careful consideration abandoned his notice of appeal and then changed his mind simply because his counsel considered it would be an advantage to him to withdraw it. That would be the case in reference to the present application. In the circumstances we therefore dismissed the application.

We now turn to the substantial appeals of the other accused.

The facts of the case may briefly be stated as follows:—

The complainant P.W. 13 owned a house in Sibu which he had been renting to the first accused. Because of difficulty of collecting the rent he decided to dispose it off. He informed the first accused so and the latter told him that he had a prospective buyer. So on 5th January 1970 he met the third and second accused as persons interested in the purchase of the house. Some difficulty appeared in this transaction. During the discussion, however, a suggestion was made apparently by the first accused that they all should go into a gold business transaction in which they could make easy money. Finally it was agreed that they would purchase a consignment of gold worth $45,000 of which the complainant would contribute $13,000 the second accused $22,000 and the third accused $10,000. The first accused being a man of straw would not contribute financially. They decided to meet again.

So on 7th January 1970, the complainant was taken by the first and second accused to a room in a house at Sungei Antu. Then the second accused knocked at the door and joined them. Then all three of them took an oath not to disclose what they were going to do even to members of their own family. Accused 4 arrived. They then went to a goldsmith's shop in Sibu where a gold bar was shown to the goldsmith who, after testing, confirmed that it was real gold and that he was prepared to purchase such gold at a certain price. Subsequently the complainant produced his $13,000 as his capital share in the venture. Evidence was given as to how he charged his land for $10,000 and made up the amount from his own savings. The second accused produced a bundle purported to contain $22,000 and the third accused another bundle purported to contain $10,000. The complainant said, however, that he was never shown the contents of the bundles produced by the accused and could not therefore say if the bundles did contain the amounts stated.

At about 9 p.m. the same night they proceeded to the Shell Jetty where the purchase of the gold was to be done. This was made clear to the complainant to be necessary because of the illegality of the transaction. Whilst they were there they saw two persons approaching and one of the accused said "the police" and all of them ran away from the place and the box or boxes containing the money and gold were thrown into the river. Complainant also stated that that night he was feeling dazed after drinking a cup of milk given to him on arriving in the room. He felt a bad headache immediately after the drink.

All the accused while in police custody made statements to the police. The admission of these statements were objected to by the defence and the learned judge held an enquiry. The first accused made altogether three police statements but the learned judge rejected one of them on the ground that it was made as a result of a promise but admitted the other two statements made on 26th and 30th January 1970. Both the statements of the second accused made on 10th January 1970 and 4th February 1970 were admitted and so was the statement by the third accused made on 4th February 1970. The fourth accused also made a statement but did not object to its admission. His statement merely denied the charge against him.

In the enquiry into the admissibility of this evidence the learned judge heard evidence of all the prosecution witnesses involved in the taking of the statements and also the evidence of the first, second and third accused. The first accused alleged in the enquiry that he was promised that he would become a prosecution witness if he confessed and therefore nothing would happen to him. In reference to his signing the certificate which says that he was giving the statement voluntarily, he alleged that he was forced to sign this certificate by the police officers. The second accused said that he was spat upon and punched by a police officer after his arrest and later Inspector Michael Lee who took the statement from him advised him to confess everything. So for that reason he gave his first statement. He made another statement on 1st February 1970 and he maintained that he did not make this second statement voluntarily. He produced a witness to support his story that he was being chased and spat and punched by a police officer.

The third accused in the enquiry said that he did not make any statement at all. A.S.P. Lim wrote down the statement on his own and then read it out to the accused who just nodded his head. He did not utter a word because he was afraid of the police constable present at the taking of the statement who threatened to assault him (the accused). Besides he was anxious to go out and when he was asked to sign the statement he did so. The prison warder was also present during the taking of the statement. He, however, did not threaten him. After giving his statement he was detained in Sibu prison. He therefore maintained that he did not give the statement voluntarily.

After hearing arguments, the learned judge admitted all the statements except the one made by the first accused on 4th February 1970 and gave his reasons for doing so. In our view he dwelt on the question of burden of proof correctly. He also dwelt on the evidence adduced at the inquiry in great detail on all aspects of the matter as submitted by counsel for the defence and by the learned deputy public prosecutor. In so doing he considered each statement and the evidence in respect of such statements separately and gave his ruling accordingly. He had in each case, except of course with regard to the statement made by the first accused on 4th February, rejected all allegation of physical assault, threat or promise alleged against the various police officers concerned.

At the close of the case for the prosecution the learned judge called upon all the accused to give their defence.

The first accused in his defence gave a statement from the dock which may be briefly stated as follows: He corroborated the complainant's story of complainant's intention to sell the house to the second accused. There appeared to be some discussion as to the price. In the course of that discussion he interposed to suggest perhaps they would be interested in the purchase of gold bars cheaply. He produced a gold bar and showed it to the second and third accused and to the complainant. They went to a goldsmith's shop where the goldsmith tested the gold and confirmed that it was genuine gold and that he was prepared to buy for between $140 to $150 per tahil. A consignment of gold would cost about $45,000 and that it is to be paid for in cash. Finally the first and second accused and the complainant agreed to be partners in the gold transaction. The complainant charged his house and finally had $13,000. At the meeting place the second and third accused produced their shares and all this money totalling $45,000 was placed on the table and the first accused subsequently collected them and put them into a bag. At this stage the door opened and the fourth accused came in and spoke to the second accused. The first accused said that all the three partners agreed to leave it to the first accused to collect the gold bars. About 8 p.m. that night the complainant, the second accused and the third accused left together with the first accused to collect the gold bars at Sungei Igan. A person named Ah Lai was waiting for them at the river bank. Ah Lai then went away and brought back two boxes. At this stage someone shouted "police coming". Ah Lai ran and the first accused followed him. Ah Lai threw the boxes into the river and the first accused also threw the box he had with him.

The second accused also gave a statement from the dock. He confirmed the story as to how they met and agreed to form a kongsi to buy the gold bars. He contributed $22,000. After they put all the money on the table the first accused collected it and put it into a bag. Then they all proceeded to the wharf, and then the first accused went away and returned with another man. The first accused and the stranger were still some distance away when he heard someone shout "police" and on hearing this they all got frightened and went in separate directions. It was apparent from his statement that he was not aware of what happened to the boxes containing the money or whether the stranger brought any gold.

The third accused in his statement from the dock corroborated the story of how they agreed to form a kongsi and purchase told. He himself produced his $10,000. It was the first accused who collected all the money and placed them in a black bag. While this discussion was going on, the fourth accused, a stranger to him, entered the room. The meeting decided they all should go and fetch the gold at night since it would not be safe to do it during the day time. So about 8 p.m. that night the third accused, the complainant, the first accused and the second accused proceeded to the rendezvous. The third accused said that he saw the first accused and one Tan Ah Lai carrying a box each in their hands. When they arrived at the junction of the road someone shouted "Police are coming" and the persons carrying the boxes threw them into the river because they were frightened. The third accused blamed Tan Ah Lai for their loss and suggested to the court that he should be brought to a court of justice. It must be apparent at this stage that it was not very clear as to the identity of Tan Ah Lai, but unfortunately, the court did not deem necessary to ask the first and the third accused to clarify as to the identity of the person referred to as Tan Ah Lai which in our view the court could have done. At least

the court could have asked him if he would like to do so.

The fourth accused giving evidence from the witness box maintained that he had no part in the whole transaction. He admitted, however, going into the room where the four partners in the kongsi met and was introduced to them. He went into the room just to ask the second accused, who was his uncle, whether he was free to go out with him for something which however was not disclosed. He was cross-examined by the learned deputy public prosecutor but maintained that he knew nothing about this business of buying gold bars. He however, said that he saw the first accused carrying the bag but denied that it belonged to him (4th accused). He denied knowledge of the identity of Tan Ah Lai. He, however, admitted that he saw the complainant on two occasions in a room on which occasion the first, second and third accused were also present.

The learned judge reserved his judgment and about a week later delivered a written judgment of 56 pages. He had dealt with every possible aspect of the case as argued before him.

First, he agreed with the submission of one of the counsel for the defence that P.W. 13 was an accomplice on the ground that the evidence adduced at the trial showed clearly that he participated in the gold bar venture freely and willingly. We might, however, point out at this stage that at the hearing of the appeal the same counsel conceded before us that P.W. 13 was not an accomplice in the charge of cheating on which all the accused were tried and convicted. In any case the learned judge made the following findings: —

(1) that the case for the prosecution rested principally on the evidence of complainant P.W. 13 and that he was an accomplice, but however, he went on to say in reference to that evidence as follows:—

"I was aware that there was no corroboration of the evidence of P.W. 13 and that inspite of the absence of corroboration, I was convinced of the truth of the accomplice's evidence that I felt safe in convicting the fourth accused."

(2) The learned judge also expressed the view that he was entitled to take into consideration the cautioned statements of all the four accused in dealing with the evidence of P.W. 13, subject to a qualification, namely that the caution statement is only admissible against the maker and against no one else and though there may be some overlapping amongst the statements of the four accused but that he all the time had in mind the above principle when considering them.

(3) The learned judge also said as follows:—

"I also found as a fact that the so-called act of throwing the two boxes purporting to contain the gold bars into the river was a theatrical act put to impress, or rather to fool P.W. 13 into believing that but for the unfortunate intervention of the police the gold bars would be delivered according to plan. If $45,000 worth of gold bars had been thrown into the river in order to avoid the police why was there no attempt made by any of the partners to try to locate and if necessary to salvage the gold? These conclusions were amply supported by the caution statements of accused Nos. 2 and 3."

We might interpose here to say that we regard as an improbability that a person would throw the boxes into the river, boxes containing $45,000 and bars of gold of equal sum, simply because somebody said "The police are coming." Besides the place was in darkness and we thought if they really wanted to keep the matter from the police they could have easily hidden the valuable gold and money somewhere. We have seen the accused in the dock and they do not seem to us to be such timid persons as they pretended to be.

We now deal with the grounds of appeal. One of them is as follows:—

"(1) (a) The charge on which your appellant was convicted disclosed no offence known to the law.

(b) Alternatively the said charge is bad in law in that they are inadequate averments and or particularisation to constitute an offence under section 420 of the Penal Code."

The gist of the complaint under this ground is that the words in the charge namely:

"You all did cheat and thereby obtained $13,000 cash from Wong Chiong Hiong alias Wong Siong Hiong in that you obtained this sum by dishonestly representing to the said Wong Chiong Hiong, that in return for the said sum you would obtain for him valuable gold bars...."

failed to state that the complainant was dishonestly induced to deliver the cash. It merely said that the accused obtained the cash by dishonest representation. In our view the words used in the charge:— "did obtain this sum by dishonestly representing..." are sufficient to include the allegation of inducement. In any case we are satisfied that the accused were not in any way misled by the words used and the point is covered by section 142 of the Sarawak Criminal Procedure Code which says:—

"No error in stating either the offence or particulars required to be stated in the charge and any omission to state the offence or those particulars shall be regarded at any stage of the case as material unless the accused was in fact misled by such error or omission."

We therefore dismiss this ground.

Complaint was also made in the way the learned judge dealt with the caution statements. In the first place it was argued that they were not made voluntarily and secondly the learned judge had just lumped together the statements made by the accused. In other words, he failed to consider them individually and in so doing had taken into consideration what one accused said against another in the caution statements. We noticed that in those statements the maker of the statement in addition to admitting directly or indirectly that he was involved in cheating the complainant, also implicated another co-accused. For example, the first accused in his statement said:

"On 8th January 1970 or 9th January 1970 some time in the morning Ah Siaw (meaning third accused) visited me at my house and handed me over $400. He told me it was for 'Coffee money' and that it was from them. Do not tell anybody, I heard Ah Siaw plan to bribe the Senior Police Officers."

The second accused said in his statement:

"When the taukey (Wong Chiong Hiong) left Ah Siaw gave me $1,800 in cash as my share I paid Goh Hock Ling a sum of $1,000 through his wife on 9.1.70 morning. The rest of the cash was kept by me in my 'Tua-ku' house at Brooke Drive close to the station at Sg. Merah Bus Company."

Again he said in another statement:

"The arrangement was made by Ah Siaw 'Chap-eat Chai'. We all cheated the 'Choo-Chu' of Ah Hock. In fact I do not know how much Ah Phing and Ah Siaw got the money from the 'Choo-Chu'. So far I received the cash from Ah Siaw."

In the statement of the third accused he said:

"After obtaining the money from Hock's 'Choo Chu', Hock gave me some coffee money. I was told that Ah Phin took all the money."

We agree that the learned judge should have referred to these parts of the statements and then say in each case what part he used and against whom. He should have also pointed out that where the statements implicate another co-accused he would ignore them.

We, however, found in the judge's judgment the following passage:

"It is clear law that a man's confession is evidence only against himself and not against his accomplices. And a statement made in the absence of an accused person by one of his co-prisoners is not and cannot be evidence against him. In my opinion, the law relating to confessions applies with equal force to caution statements. In *Regina* v. *Rudd* (1948) 32 Cr. App. R. 138 at page 140, Humphreys J. held that 'while a statement made in the absence of an accused person by one of his co-accused cannot be evidence against him, if a co-defendant goes into the witness box and gives evidence in the course of a joint trial, then what he says becomes evidence for all the purposes of the case including the purpose of being evidence against his co-defendant'."

In view of what he stated we must assume that the learned judge in dealing with these caution statements would not make use of any part of the statements which implicated another co-accused.

In reference to the voluntariness of the statements we found that the learned judge had in his judgment stated as follows: —

"I hold that I was satisfied beyond reasonable doubt that all the three accused made the statements voluntarily and that no promise, inducement or threat was made to them or any of them by the police officer or someone in authority."

As we have previously stated the learned judge made a separate finding in reference to each statement made by the accused. In reference to those made by the second accused he came to the following conclusion: —

"Accordingly I rule that the prosecution had satisfactorily discharged the onus of proof that these caution statements of second accused dated 3rd February 1970 had been voluntarily given and that it is admissible evidence. In reference to the statement of third accused after referring to the various allegations made by the accused in the trial within a trial he came to this conclusion:—

'I am satisfied that the accused (that is third accused) made the caution statement to A.S.P. Lim freely and willingly after having been duly cautioned. I hold this caution statement of accused 3 to be admissible in evidence.' "

He rejected the statement made by the first accused on 4th February 1970 and he finally ruled as follows:—

"I rule that the two statements of accused 1, dated 26th January 1970 and 30th January 1970, the two statements of accused 2 on 10th January 1970 and 4th February 1970 and the statement of accused 3 dated 4th February 1970 to be admissible in evidence."

We have stated previously that the learned judge, before admitting these statements, had fully and, with respect, correctly gone into the question of law. On the question of facts he heard the evidence and saw the witnesses give their evidence and dealt fully with it. As an appellate court, particularly where there is no full transcript of the oral evidence, we are in a far less advantageous position to decide all these issues of credibility than the trial judge who had heard the evidence in full and observed the witnesses as they gave it, noting their pauses and hesitations and any physical signs of confidence and embarrassment. We therefore come to the conclusion that we should not interfere with the learned judge's ruling as to voluntariness of these statements.

In our opinion the other grounds of appeal are of no substance.

It was apparent from the whole evidence that it was never disputed by the defence that the complainant and the accused went to the jetty and the purpose for which they did so. The only issue which the learned judge had to decide was this: Was it on the balance of probability true that the boxes which were thrown into the water contained the money and the gold as alleged by the defence? Would a reasonable man on the balance of probability accept the defence version that the two persons who were carrying the boxes containing the gold and cash threw them into the river simply because they saw two men approaching whom they suspected to be policemen? The learned judge rejected this version. We agree with him. Once that version of the defence story is rejected then it would become obvious that the two boxes never contained the gold or cash and that the throwing of the boxes into the water was, to use the words of the learned judge, "a theatrical act put up to impress or rather to fool P.W. 13 into falsely believing that but for the unfortunate intervention of the police the gold bars would be delivered according to plan."

Application of first accused dismissed.

Appeals of the other accused dismissed.

CHOW YOKE PUI v. HONGKONG & SHANGHAI BANKING CORPORATION, MALACCA

[F.C. (Ong C.J. (Malaya) Suffian & Gill F.JJ.) April 27, 1971]

[Kuala Lumpur — Federal Court Civil Appeal No. 103 of 1970]

Partnership — Sale of share of partner — Valuation — Ascertainment of — Guarantee — Claim under.

Contract — Guarantee — Claim under — Extent of liability.

The appellant, plaintiff in the action, and one Tan Tuan Boon, first defendant in the action (now deceased), together with one S.R. Doshi, carried on business as sharebrokers in a firm known as Chua & Co. under a deed of partnership dated June 1, 1956. On June 29, 1967, the appellant gave notice of his retirement from the partnership. On July 14, 1967, the first defendant elected, under clause 17 of the partnership agreement, to purchase the plaintiff's share in the firm "at the net value thereof as ascertained by a single independent valuer if the parties agree upon one or three independent valuers one to be appointed by each of the parties" to the agreement. On December 22, 1967, the res-